

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BIS Advanced Software Systems, Ltd.,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 04-11960-RWZ
)	
Red Bend Software, Inc., <i>et al</i> ,)	
)	
Defendants.)	
_____)	

**PLAINTIFF’S OPPOSITION TO DEFENDANT
RED BEND’S MOTION TO AMEND SCHEDULING ORDER**

Plaintiff BIS Advanced Software Systems, Ltd. (hereinafter, “Plaintiff”) submits this response to Defendant Red Bend’s Motion to Amend the Scheduling Order (*see* D.I. 76).

Plaintiff has filed a Motion for Reconsideration (*see* D.I. 68) requesting reconsideration of the Court’s Order dated March 22, 2006 (*see* D.I. 67) based upon recently decided case law and Plaintiff’s second covenant not to sue. Plaintiff’s Motion for Reconsideration specifically requested that Defendants’ declaratory judgment Counterclaims of invalidity be dismissed without prejudice. In Plaintiff’s second covenant not to sue, Plaintiff agreed not to sue any named Defendant based upon Red Bend’s currently available products, or based upon those it is prepared to produce. As such, Defendants no longer have any reasonable apprehension of suit, and there is no longer any basis for declaratory judgment jurisdiction. For this reason alone, Defendant’s Motion to Amend should be denied as moot.

Additionally, Defendant has failed to even attempt to meet the minimal requirements necessary for amending the scheduling order. *See* Fed. R. Civ. P. 16(b) (“A schedule shall not be modified except upon a showing of good cause”); *see also Sigros v. Walt Disney World Co.*, 190 F. Supp. 2d 165 (D. Mass. 2002) (finding good cause and granting motion to amend where

movant had pursued discovery with diligence, where movant identified outstanding issues necessitating further discovery, and where motion to amend was timely filed).

In the present case, Defendant failed to argue that it had any good cause for not complying with the existing scheduling order. Defendant has not been diligent, nor has it identified any outstanding issues necessitating further discovery in this case. Moreover, Defendant's Motion to Amend is untimely. Although Defendant may argue that the Court only entered its Order (*see* D.I. 67) denying Defendant's Motion to Compel (*see* D.I. 53) and denying Defendant's Motion to Stay (*see* D.I. 65) on March 22, 2006, this argument should not succeed for at least two reasons. First, Defendant could have diligently pursued discovery under the existing scheduling order during the pendency of its Motion to Compel, which was filed on October 20, 2005, more than seven months ago. Second, more than two months have passed since entry of the Order, during which time Defendant Red Bend did not move to amend the scheduling order, or make any other timely or diligent pursuit of discovery. Therefore, for lack of good cause shown, Defendants not having been diligent, and because the motion is untimely, the motion should be denied.

In sum, in view of Plaintiff's second covenant and the subsequent lack of declaratory judgment jurisdiction, Defendant Red Bend's Motion to Amend the Scheduling Order should be denied as moot. Further, in view of Defendant's lack of diligence and good cause, Defendant Red Bend's Motion to Amend the Scheduling Order should be denied.

Respectfully submitted,

BIS ADVANCED SOFTWARE SYSTEMS, LTD.

By its attorneys,

/s/ Scott McConchie

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Dated: June 5, 2006

Certificate of Service

The undersigned certifies that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as not-registered participants on June 5, 2006.

/s/ Scott McConchie

Scott McConchie